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No. 92-970

In The

Supreme Court of the United States

October Term, 1992

WOODS PETROLEUM CORPORATION,

Petitioner,

v.

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

YVONNE T. KNIGHT
Counsel of Record
PATRICE KUNESH
ROBERT T. ANDERSON
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Respondent Cheyenne-Arapaho Tribes of Oklahoma

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTERSTATEMENT OF THE CASE

In its Petition for a Writ of Certiorari, Woods Petroleum Corporation (hereinafter "Woods") grossly mischaracterizes the facts and proceedings in this case. Therefore Respondent, the Cheyenne-Arapaho Tribes of Oklahoma (hereinafter "Tribe")[1] respectfully submits this Counterstatement of the Case, and also refers this Court to the statement of facts set forth in the Tenth Circuit's decision, Cert. App. 2-8,[2] and in the district court's decision, Cert. App. 18-23.

The facts of this case revolve around the unique escalated oil and gas market in the early 1980s. In the Anadarko, Oklahoma area, the Bureau of Indian Affairs Acting Area Director reported that "deep gas discovery prompted a short period of astronomical bids on advertised mineral tracts." Cert. App. 45. Indeed, a comparison of the Indian mineral lease bonuses obtained for various Indian and tribally owned tracts in the Anadarko area during this period shows that the bonuses for tribal leases approved in the late 1970s amounted to only $35 per acre with a royalty rate of 16⅔%. In sharp contrast, bonuses for leases in the same area which were approved in the early 1980s ranged from $235 to $315 per acre with

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[1] The Cheyenne-Arapaho Tribes of Oklahoma is a federally recognized tribe organized under a constitution and by-laws approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. § 503, with a governing body called the Cheyenne-Arapaho Business Committee, which is authorized to enter into oil and gas leases on the Tribe's behalf.

[2] "Cert. App." refers to the Appendix to Woods' Petition for a Writ of Certiorari.

an increased royalty rate of 20%. (Cert. App. 93, 123, 131, 136).

The Tribe owns six 160-acre tracts of land located in sections 29 and 32 in Custer County, Oklahoma, within the Anadarko area. This land is held in trust by the Untied States for the benefit of the Tribe. Four of these tracts were separately leased to Woods for the purpose of oil and gas production. The three tribal leases at issue in Woods' Petition do not involve drilling operations.[3] The fourth tribal lease[4] (not at issue in this proceeding) is the site of the well for the section 32 drilling and spacing unit and was the subject of a cross-appeal by the Tribe in the Tenth Circuit.[5] *See* map, Cert. App. 136. The Secretary of the Interior (hereinafter "Secretary") approved these tribal leases pursuant to his authority under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-g, 52 Stat. 348.

Each lease contains a "habendum clause", which fixes a primary term of 5 years ending May 10, 1981, and

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[3] These leases include number 14-20-205-6897, covering the southeast quarter of Section 32-14N-20W; lease number 14-20-205-6895, covering the northeast quarter of Section 32-14N-20W; and lease number 14-20-205-6894, covering the southwest quarter of Section 29-14N-20W.

[4] The fourth lease is number 14-20-205-6896, covering the northwest quarter in Section 32-14N-20W.

[5] Another oil and gas company, Reading and Bates Petroleum Co., is the lessee of the fifth and sixth tribal leases in sections 29 and 32. The fifth tribal lease, number 14-20-205-7672, covering the northeast quarter in Section 29-14N-20W, is the well site for the section 29 drilling and spacing unit. These tribal leases are not at issue in the present case.

which provides that the lease will automatically expire, absent development by a producing well before the end of the 5-year primary term. Each lease also contains a "commence drilling" clause, which purports to extend the life of the lease beyond the primary term upon the commencement of drilling on the leasehold. Each lease further contains a clause (referred to as "clause 9" in the lower courts' opinions) allowing the lease to be made subject to a communitization agreement approved by the Secretary.[6] Such communitization agreement would pool the lease with other leases into one development or communitized unit for the purposes of maximizing development of the mineral resources, and apportioning among the leases in the unit the costs and revenues from the unit well(s). And finally, each of these leases was purportedly subject to a communitization agreement which provides, *inter alia*, that any unit well will be deemed to be actually drilling on every lease within the unit, thus satisfying the actual drilling requirement of such lease.[7]

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[6] *See* § 4 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396d, and the Secretary's implementing regulations:

> All such leases shall be subject to any cooperative or unit development plan affecting the leased lands, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

25 C.F.R. § 171.21(b) (1981); 25 C.F.R. § 211.21(b) (1991); *Kenai Oil and Gas, Inc. v. Dept. of Interior*, 671 F.2d 383, 385-386 (10th Cir. 1982).

[7] The clause of the communitization agreements provides in pertinent part: "It is further agreed that the actual drilling, completion, continued operation or production of a well or wells for communitized substances on the communitized area shall be construed and considered as the actual drilling,

In anticipation of the expiration of the tribal leases, Woods began the process of communitizing all lease interests in sections 29 and 32. Woods entered into two communitization agreements with certain non-Indian working interest and royalty owners of the leases in those sections. And beginning on April 16, 1981, Woods initiated efforts to obtain the consent of the Tribe and the Secretary to these communization agreements for the purpose of continuing in force the three non-drilling tribal leases. Without approved communitization agreements, these tribal leases would expire by their own terms on May 10, 1981. Cert. App. 131.

During several meetings between the Tribe's Business Committee, the working interest owners' representatives, and the officials from the Bureau of Indian Affairs Anadarko Area Office, the Tribe declined to approve the proposed communitization agreements. The Tribe instead requested that the oil companies renegotiate the tribal leases commensurate with the escalated oil and gas market during the boom period then in effect.

The oil companies rejected the Tribe's request to renegotiate, and presented the Tribe with an ultimatum to "sign [the communitization agreements] by May 6, or face litigation", Ad. Rec. 611, and that in the even that the tribal leases were lost for failure to communitize, the oil companies would "pursue every legal remedy" available in order to receive restitution for the losses it might sustain. Cert. App. 4, 21.

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completion, continued operation and production from each and all of the lands within and comprising said communitized area." Tribal leases, ¶ 9; Cert. App. 161.

On May 5, 1981, the oil companies submitted the communitization agreements to the United States Geological Survey, which recommended approval of the agreements the following day. On May 8, 1981, notwithstanding the Tribe's opposition, the Acting Area Director for the Bureau of Indian Affairs Anadarko Area, as the Secretary's delegate, also approved the agreements. The record indicates that at the time he approved the agreements, thereby purportedly extending the life of the leases, the Acting Area Director failed to consider the unique economic conditions, including the escalated market value and the marketability of the leases. Cert. App. 94.

The Tribe then filed a timely appeal to the Interior Board of Indian Appeals (hereinafter "IBIA"), which subsequently affirmed the Secretary's[8] decision. The IBIA granted the Tribe's request for reconsideration and also provided the Secretary with an opportunity to supplement the record to explain the basis for the decision reached in 1981. On May 18, 1984, the IBIA again affirmed the Secretary's decision approving the communitization agreements, holding that since the "long term" economic effects had been considered, the agency had not abused its discretion.

The Tribe commenced this action on July 14, 1984, against the Secretary and Woods seeking district court review of the Secretary's decision approving the two communitization agreements. Upon review of the record,

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[8] In the lower courts' decisions, the term "Secretary" generally refers to the Secretary of the Interior and his delegates, including the Acting Area Director.

the district court concluded that the administrative record was insufficient to resolve the issues. The district court remanded the case to the Secretary with orders to provide further explanation of the basis of the agency's decision. In particular, the court inquired whether the Secretary considered the market value and marketability of the tribal leases before approving the proposed communitization agreements. In his Response, the Secretary admitted that he "did not consider any evidence of the market value and marketability of new leases." Cert. App. 94.

On consideration of the cross-motions for summary judgment subsequently filed by the parties, the district court found that the Secretary breached his fiduciary responsibilities to the Tribe under the Indian Mineral Leasing Act by approving the communitization agreements without considering contemporary oil and gas market conditions. As a consequence of this breach, the district court found that the Secretary's approval of the communitization agreements was invalid, and the leases for the three tracts upon which no drilling has occurred had expired on May 10, 1981 – the end of their primary terms. Cert. App. 50-51, 60. The Tenth Circuit affirmed, without modification, the district court's order on this issue. Cert. App. 17.

REASONS FOR DENYING THE WRIT

I. THE QUESTION OF WHETHER THE LOWER COURTS USURPED THE SECRETARY'S AUTHORITY INVOLVES ISSUES NOT PASSED UPON BY THE LOWER COURTS, AND THUS IS PREMATURELY RAISED IN THIS COURT.

A. The Lower Courts Have Not Substituted Their Judgment For That Of The Secretary's By Making Factual Findings Concerning The Market Value/Marketability Factor.

Woods contends,

> The Court of Appeals has decided *de novo* how the Secretary *should have ruled* had he considered the omitted [economic] factor, rather than remanding this matter to allow the Secretary, as required by law, to determine communitization with the additional factor announced by the court. This *judicial* intervention . . . is an unprecedented usurpation of the Secretary's congressionally conferred authority. . . .

Cert. Pet. at 8-9 (emphasis in original). As shown below, this contention is untenable because it erroneously assumes that the lower courts' decisions were grounded upon a factual finding as to the omitted market value/marketability factor. The lower courts have not made a factual finding on this factor.

The lower courts found that the tribal leases could have been continued in force beyond May 10, 1981, either by actual drilling on the leaseholds pursuant to express

provision of the leases,[9] or by application for an approved communitization agreement[10] pooling the tribal leases with other leases into one drilling and production unit. Neither of these preconditions was met in this case.

First, it is undisputed that no well was actually drilled on any of the three tribal leases. And second, the lower courts found that the communitization agreements were ineffective to continue the leases in force because the Secretary's approval ignored a critical relevant factor:

> [T]he Secretary . . . should have considered the economic realities of an oil and gas lease in the Anadarko region in the early 1980's as compared to 1976. The failure to do so was arbitrary, capricious, and an abuse of discretion.

Cert. App. 17. Accordingly, the lower courts held that the Secretary's failure to consider the 1981 market value of

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[9] As provided in the habendum clause of the leases, the lease is "for the term of 5 years . . . and as much longer thereafter as oil and/or gas is produced in paying quantities." ¶ 1 of tribal leases. A commence drilling clause in the leases provides: "If the lessee shall commence to drill a well within the term of this lease, the lessee shall have the right to drill such well to completion with reasonable diligence and if oil or gas, or either of them, be found in paying quantities this lease shall continue in force with like effect as if such well had been completed within the term of years first mentioned." ¶ 1 of tribal leases.

[10] Where tribal leases are involved, 25 U.S.C. § 396d requires that the Secretary approve communitization agreements. The law in the Tenth Circuit is that because communitization agreements operate to extend leases beyond their primary terms, the Secretary must consider, among other relevant factors, the current market conditions for such leases in determining whether to approve communitization agreements. *See, Kenai Oil and Gas, Inc. v. Dept. of Interior,* 671 F.2d 383 (10th Cir. 1982).

the leases rendered his approval of the communitization agreements ineffective *to the extent* those agreements purported to extend the life of the non-drilling leases beyond their primary terms. *See* discussion *infra* pp. 10-11.

Having thus found that neither of the two precondition for continuing the tribal leases in force was met in this case, the lower courts implicitly held that the leases expired *by operation of their express terms.* Contrary to Woods' contention, the lower courts did not usurp the Secretary's authority and make a factual finding that 1981 market conditions mandated that the existing leases be allowed to expire and new tribal leases be negotiated.

Thus, in summary, the lower courts held that the tribal leases expired on May 10, 1981, at the end of the 5-year primary terms, by operation of their own provisions. There has been no factual finding either by the lower courts or by the Secretary as to the market value/marketability factor.

B. The Lower Courts Have Not Yet Addressed The Question Of Whether The Communitization Agreements Should Be Given Effect In Whole Or In Part.

Woods contends that the Tenth Circuit has resolved the question of whether the communitization agreements should be given effect in whole or in part. This is incorrect. The lower courts have not passed upon this

question, and therefore, Supreme Court review is inappropriate.[11]

The question of the continued effectiveness of the communitization agreements has been expressly reserved by the district court's order of May 26, 1989, for the remedies stage of proceedings in this case. Significantly, the court did not find that the communitization agreements were void *in toto*. The district court specifically held that,

> in approving the subject communitization agreements, the Area Director breached his trust responsibility to the Tribe under the [Indian Mineral Leasing Act of 1938]. *Therefore, the subject communitization agreements do not extend the non-drilling 1976 leases, and these leases thus expired at the end of their primary terms.*

Cert. App. 51-52 (emphasis added).

That the district court did not find the communitization agreements void *in toto* is confirmed by a subsequent order entered on May 31, 1989. This order specifically addresses the question of whether the communitization agreements are partially effective to unitize the tribal lands covered by the expired leases, thus entitling the Tribe to share in the proceeds of a second well drilled on non-Indian land in the section 29 unit. In this order, the

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[11] This Court does "not ordinarily consider questions not specifically passed upon by the lower court. . . . " *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984); and *see, State Farm Mutual Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945); and *Adler v. Board of Education*, 342 U.S. 485, 496 (1952).

district court expressly stated that it had reserved judgment on the validity of the communitization agreements:

> The question of the proper distribution of proceeds from the Hughes No. 2-29 well *if the section 29 communitization agreement is deemed invalid has not yet been determined.*

Resp. App. 2 (emphasis added).[12] The district court further stated:

> The Tribe has challenged the instrument that entitles it to royalties from the Hughes No. 2-29 well that are attributable to the Reading and Bates lease (i.e. the communitization agreement for section 29). *The impact of the Tribe's challenge* on the distribution of funds in section 29 *has yet to be determined,* and deposit of the funds with the Court is therefore justified.

Resp. App. 3 n.1 (emphasis added).

Woods apparently contends that the Tenth Circuit's ruling as to the validity of the communitization agreements precludes further review of this issue by the district court. Woods apparently bases this contention on the italicized portion of the following language in the Tenth Circuit's decision:

> Because the Secretary abused his discretion, *the communitization agreements are not valid,* and the leases upon which drilling had not commenced as of May 10, 1981, expired on that date. Accordingly, the order of the district court granting summary judgment to the Tribe is AFFIRMED.

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[12] "Resp. App." refers to the Appendix to this brief.

Cert. App. 17. However, properly viewed in context and in light of the district court's decision, which was affirmed without modification by the Tenth Circuit, it is clear that the statement was intended, not to overrule the district court's ruling reserving questions as to the future effectiveness of the communitization agreements,[13] but

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[13] Arguably, in the Tenth Circuit, the lower courts' rulings that the tribal leases expired is not inconsistent with a remand to the Secretary to consider the previously ignored economic factors, and, if appropriate, to approve the communitization agreements retroactively to the date they were submitted for approval prior to the expiration of the leases. In *Cotton Petroleum Corp. v. Dept. of Interior*, 870 F.2d 1515, 1523 n.1 (10th Cir. 1989), the Tenth Circuit decided that where a communitization agreement is submitted to the Secretary for approval before a lease expires, and that Secretary approves the agreement *after* the lease expires, the approval will relate back to the date of submission, thereby reviving the leases and continuing them in force. The dissent in *Cotton* seemingly agreed that the Secretary has authority to make his post-expiration approval retroactive to the date the communitization agreement was submitted, but indicated disagreement to the extent the majority may have adopted the view that the Secretary lacked discretion to decide not to have such approval relate back to revive the leases. *Id.* at 1529-30. However, the *Cotton* holding, applying the doctrine of relation back to allow the Secretary to revive expired leases, is based upon questionable authority. The cases relied upon by the *Cotton* court uphold the Secretary's authority to relate his approval of a document back to a date preceding a deadline where the deadline was fixed by the Secretary's own rules and regulations which he has the power to suspend. Since the Secretary is not a party to the leases, arguably he would have no power to suspend the provisions of those leases mandating a deadline for automatic expiration.

simply to affirm the district court's ruling that the communitization agreements were ineffective to extend the life of the tribal leases.

II. THE DECISIONS BELOW CREATE NO INTER- OR INTRA-CIRCUIT CONFLICT REQUIRING THIS COURT'S REVIEW.

A. The Federal Circuit's Ruling in *United Nuclear* is Consistent With The Tenth Circuit's Ruling in the Present Case.

Woods contends that the Tenth Circuit's decision conflicts with the Federal Circuit's decision in *United Nuclear Corp. v. United States,* 912 F.2d 1432 (Fed.Cir. 1990) (hereinafter *United Nuclear*). Woods hypothesizes that if the Secretary had rejected the tribal leases in 1981 based upon the economic factor, under the holding in *United Nuclear,* that action would have constituted a partial basis for a regulatory taking claim. Cert. Pet. at 11. To the contrary, the rationale applied by the Tenth Circuit in the present case is entirely consistent with the Federal Circuit's rationale in *United Nuclear.*

In *United Nuclear,* a mining company had two mining leases with the Navajo Tribe which were due to expire unless the Secretary of Interior, pursuant to this statutory authority,[14] approved its mining plan. The Secretary, however, gave the Tribe a veto over the mining plan. The Tribe subsequently vetoed the plan. Based solely upon the Tribe's veto, the Secretary refused to approve the

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[14] *United Nuclear,* 912 F.2d at 1434; *citing* 25 U.S.C. § 396a (1970) and 25 C.F.R. § 171.2 (1971).

plan. Thus, the issue before the court was whether the Secretary's refusal to approve the mining plan formed part of the basis for a fifth amendment regulatory taking of the lessee's property interests. 912 F.2d at 1436.

The Federal Circuit held that the Secretary delegated to the Tribe all of his discretionary authority to approve a mineral development plan, and in effect, failed to make an independent evaluation of such plan. The court found that these facts, *inter alia*, constituted partial grounds for a regulatory taking. *Id.*[15]

Woods' reliance on *United Nuclear* is misplaced. Woods ignores the critical fact that in *United Nuclear*, the Secretary completely failed to exercise any discretionary authority over the approval of the mining plan.

In the present case, however, the Secretary did not delegate any of his discretionary authority to the Tribe. Indeed, the Secretary ignored the Tribe's wishes that he not approve the communitization agreements so that the tribal leases could be renegotiated. Cert. App. 4, 21. Here, the Secretary abused his discretion by failing to consider one critical factor relevant to the approval of the communitization agreements. Thus, in this case, the Secretary did not abdicate his authority to approve communitization agreements.

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[15] In *United Nuclear*, the Federal Circuit based its analysis of the regulatory taking issue on three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. 912 F.2d at 1435.

United Nuclear therefore provides no basis for finding that the hypothetical rejection of the communitization agreements in 1981 would have constituted a partial basis for a regulatory taking claim. Accordingly, the Federal Circuit's holding in *United Nuclear* does not conflict with the Tenth Circuit's holding in the present case.

B. The Present Case And *Cotton* Are Corollaries To The General Rule Established In *Kenai*; Thus There Is No Intra-Circuit Conflict.

Woods also contends that the decisions in this case are inconsistent with the Tenth Circuit's decision in *Cotton Petroleum Corp. v. Dept. of Interior*, 870 F.2d 1515 (10th Cir. 1989) (hereinafter *Cotton*). Cert. Pet. at 12. However, the decisions in this case and *Cotton* are the logical and consistent results of the application of the general rule established in the seminal case of *Kenai Oil and Gas, Inc. v. Dept. of Interior*, 671 F.2d 383 (10th Cir. 1982) (hereinafter *Kenai*), a case not cited to by Woods.[16]

In *Kenai*, the Tenth Circuit established the general rule that the Secretary, acting as a trustee in overseeing the economic and conservation interests of tribes in the

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[16] Woods' failure to cite the Tenth Circuit's decision in *Kenai Oil and Gas, Inc. v. Dept. of Interior*, 671 F.2d 383 (10th Cir. 1982), a case directly addressing the issues in this case and upon which the Tenth Circuit premised its decisions in both this case and *Cotton* (the case upon which Woods bases this appeal), arguably violates Sup. Ct. R. 14.5, which states, "The failure of a petitioner to present with accuracy, brevity, and clearness *whatever is essential to a ready and adequate understanding of the points requiring consideration* will be a sufficient reason for denying the petition." (emphasis added).

development of their mineral resources, must consider all relevant factors impacting these interests when making any decision involving tribal oil and gas leases. 671 F.2d at 383, 386-387, *citing Gray v. Johnson*, 395 F.2d 533, 536 (10th Cir.), *cert. denied*, 393 U.S. 906 (1968); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-416 (1971).[17] In *Kenai*, the Tenth Circuit upheld the Secretary's disapproval of a communitization agreement because he had considered all the relevant factors, and thus, "properly exercised his judgment and discretion in refusing to approve the proposed communitization agreements." 671 F.2d at 388. The factors relevant to the Secretary's decision in evaluating a proposed communitization agreement include conservation and economic concerns. *Cotton*, 870 F.2d at 1517; *citing Kenai*, and the Guidelines for the approval of communitization agreements, adopted on April 23, 1982, and published in the Federal Register, 47 FR 26920.

The decisions in the instant case and in *Cotton* apply the *Kenai* rule, and establish consistent corollary rulings. In *Cotton*, the Tenth Circuit struck down the Secretary's approval of a communitization agreement because he had considered only the economic factor, and ignored all

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[17] This Court stated in *Overton Park* that the reviewing court must scrutinize the facts to determine "whether the Secretary's decision was not arbitrary, capricious, or otherwise not in accordance with the law." 401 U.S. at 416; 5 U.S.C. § 706(2)(A). "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors . . . ." 401 U.S. at 416; *Kenai*, 671 at 386; *Cotton*, 870 F.2d at 1525.

other relevant factors.[18] And in the instant case, the Tenth Circuit struck down the Secretary's approval of the communitization agreements because he had considered only the conservation factor, and ignored the economic factor.

Thus the general rule established by the Tenth Circuit in *Kenai* was applied consistently in the present case and in *Cotton*. These cases provide no support for Woods' claim of an intra-circuit conflict.

III. THIS COURT SHOULD DENY THE PETITION BECAUSE THE DECISIONS BELOW TURN ON UNIQUE FACTS UNLIKELY TO REOCCUR.

The decisions below, holding that the tribal leases expired due to the Secretary's failure to consider the market value/marketability factor before he approved the communitization agreements, turn on circumstances unique to the early 1980s which are unlikely to reoccur. The early 1980s experienced a phenomenal oil and gas boom period in the region where the leases are located. As stated by the Tenth Circuit:

> Unusual conditions existed in the Anadarko area in the early 1980s. The record establishes that the Area Director reported to the Secretary that deep gas discovery in the Anadarko area

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[18] As the Tenth Circuit stated in *Cotton*:

> In any event, as previously discussed herein, the Secretary simply failed to set forth, discuss and analyze all of the factors his own guidelines and our *Kenai* opinion required of him. . . .

Cotton, 870 F.2d at 1527.

> had prompted a short period of astronomical bids on advertised mineral tracts.

Cert. App. 13. Besides the instant case, this boom period gave rise to only three other cases in the Tenth Circuit involving questions of whether the Secretary acted properly in approving or disapproving communitization agreements. *See, Kenai, Cotton,* and *Woods Petroleum Corp. v. Dept. of Interior,* CIV-86-1623-A (W.D. Okla, filed 1986) (now pending on appeal to the Tenth Circuit). As indicated by the Tenth Circuit, the boom period was short-lived.

Additionally, the conflict in the instant case preceded the Secretary's promulgation of Guidelines to be followed by Bureau of Indian Affairs officials in evaluating communitization agreements. The subject tribal leases expired on May 10, 1981, and the Secretary's Guidelines were adopted on April 23, 1982, as a result of the Tenth Circuit's decision in *Kenai. See,* Cert. App. 100-101, and 107-109; 47 FR 26920; and *Cotton,* 870 F.2d at 1517, *citing Kenai.* Such Guidelines are intended to prevent the Secretary and his delegates in the future from ignoring relevant factors, such as occurred in this case.

Thus, the questions presented by the Petition, while important to the parties, are unlikely to have widespread recurring significance, and thus do not rise to a level of public importance that would warrant review by this Court. *See, e.g., Rice v. Sioux City Memorial Parks Cemetery,* 349 U.S. 70, 74, 79 (1955).

CONCLUSION

Based upon the foregoing points and authorities, the Cheyenne-Arapaho Tribes of Oklahoma respectfully submits that this Court should deny Woods' Petition for a Writ of Certiorari.

Respectfully submitted,

YVONNE T. KNIGHT
Counsel of Record
PATRICE KUNESH
ROBERT T. ANDERSON
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Respondent
Cheyenne-Arapaho
Tribes of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, Plaintiff,	)	No. CIV-84-1765-A
v.	)	
UNITED STATES OF AMERICA, et al.,	)	

ORDER

(Filed May 31, 1989)

This matter is before the Court for consideration of the Motion to Vacate Order of June 27, 1988 granting Woods Leave to Deposit Royalty Funds Into Court Registry and Alternatively Motion to Modify Order, filed by the plaintiff, the Cheyenne-Arapaho Tribes of Oklahoma (the Tribe). The Woods Petroleum Corporation (Woods) has responded.

In its June 27, 1988 order, the Court granted Woods leave to deposit in the Court registry certain proceeds from the Hughes No. 2-29 well in section 29 of Custer County. The proceeds constitute royalty funds attributable to the Tribe's lands within section 29. In support of its Motion to Vacate, the Tribe now argues that the deposited funds are not at issue in this case and that, as a result, Rule 67 of the Federal Rules of Civil Procedure does not authorize their deposit with the Court.

Since the Hughes No. 2-29 well is located on a tract that is not owned by the Tribe, the Tribe's entitlement to the subject royalty funds is based on the communitization agreement for section 29. The Tribe maintains that since it has not challenged that part of the communitization agreement that establishes a unit for section 29, it is entitled to the subject royalty funds regardless of the disposition of the instant case.

In response, Woods contends that the Tribe has challenged the validity of the section 29 communitization agreement as a whole. According to Woods, if the Tribe prevails in this action, the section 29 communitization agreement will be deemed void in all respects, and the Tribe will not be entitled to any proceeds from the Hughes No. 2-29. Thus, Woods concludes, the subject royalty funds are in dispute, and deposit with the Court is warranted.

Upon review of the record, the Court finds the Tribe's argument unpersuasive. The question of the proper distribution of proceeds from the Hughes No. 2-29 well if the section 29 communitization agreement is deemed invalid has not yet been determined. Moreover, Woods' contention that the communitization agreement must be either enforced or voided as a whole finds some support, arguably, in certain language in the Tenth Circuit's recent decision in *Cotton Petroleum Corp. v. Department of the Interior*, 870 F.2d 1515, 1527 (10th Cir. 1989). Thus, deposit

of the subject funds with the Court remains appropriate.[1] Accordingly, the Tribe's Motion to Vacate is Denied.

/s/ Wayne E. Alley
WAYNE E. ALLEY
United States
District Judge

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[1] In the alternative, the Tribe has requested the Court to modify its June 27, 1988 order to clarify that Woods is not authorized to deposit royalties from the lease granted by the Tribe to Reading and Bates Petroleum Company for the NE/4 of section 29. The Tribe argues that since Reading and Bates is not a party to this case and since the Reading and Bates' lease is not at issue in this case, royalty monies from that lease are not here in dispute.

For the reasons stated above, the Court does not find succh [sic] modification of the June 27, 1988 order appropriate. The Tribe has challenged the instrument that entitles it to royalties from the Hughes No. 2-29 well that are attributable to the Reading and Bates lease (i.e. the communitization agreement for section 29). The impact of the Tribe's challenge on the distribution of funds in section 29 has yet to be determined, and deposit of the funds with the Court is therefore justified.